



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

Lewis K. Loss, Esq.
Michael S. Steinberg, Esq.
Loss, Judge & Ward, LLP
Two LaFayette Centre
1133 21st Street, NW Suite 450
Washington, DC 20036

JUL 17 2015

RE: MUR 6869
Commission on Presidential Debates
Frank Fahrenkopf, Jr.
Michael D. McCurry

Dear Messrs. Loss & Steinberg:

On September 17, 2014, the Federal Election Commission notified your clients, the Commission on Presidential Debates, Frank Fahrenkopf, Jr., and Michael D. McCurry, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. On December 1, 2014, and April 20, 2015, the Commission notified you of supplements to the complaint and provided you with a copy of the supplements.

On July 14, 2015, the Commission found, on the basis of the information in the complaint and supplements, and information provided by you, that there is no reason to believe the Commission on Presidential Debates or Frank Fahrenkopf, Jr. and Michael D. McCurry as Co-Chairs violated 52 U.S.C. §§ 30118(a) or 30116(f), and no reason to believe that the Commission on Presidential Debates violated 52 U.S.C. §§ 30103 or 30104. Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003) and Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record, 74 Fed. Reg. 66,132 (Dec. 14, 2009). The Factual and Legal Analysis, which more fully explains the Commission's findings, is enclosed for your information.

If you have any questions, please contact Tracey L. Ligon, the attorney assigned to this matter at (202) 694-1650.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark Allen".

Mark Allen

Assistant General Counsel

Enclosure
Factual and Legal Analysis

FEDERAL ELECTION COMMISSION
FACTUAL AND LEGAL ANALYSIS

RESPONDENTS: Commission on Presidential Debates
Frank Fahrenkopf, Jr.
Michael D. McCurry

MUR: 6869

I. INTRODUCTION

This matter arises from a complaint alleging that the Commission on Presidential Debates ("CPD") and CPD Co-Chairs Frank Fahrenkopf, Jr. and Michael D. McCurry ("Respondents")¹ failed to comply with the Commission's regulations governing debate sponsorship and thereby violated the Federal Election Campaign Act of 1971, as amended (the "Act"), by making prohibited contributions and expenditures, accepting prohibited contributions, and failing to register and report as a political committee. Respondents deny the Complaint's allegations, assert that the Commission and courts have considered and rejected Complainant's arguments on multiple occasions, and request that the Commission dismiss the Complaint. As explained below, the Commission finds no reason to believe that Respondents violated the Act.

II. FACTUAL BACKGROUND AND LEGAL ANALYSIS

The CPD is a 26 U.S.C. § 501(c)(3) organization that incorporated in the District of Columbia in 1987 as a private, not-for-profit corporation to "organize, manage, produce, publicize and support debates for the candidates for President of the United States." Resp. at 1-3 (Dec. 15, 2014). Respondents state that the CPD derives its funding from sources that include corporations, foundations, universities, and private donations. *Id.* at 3-4.

¹ On September 1, 2014, the Federal Election Campaign Act of 1971, as amended, was transferred from Title 2 to new Title 52 of the United States Code.

According to Respondents, the CPD has staged presidential general election debates since 1988 pursuant to the Act's safe harbor provision that exempts from the definition of "expenditure" "nonpartisan activity designed to encourage individuals to vote or to register to vote." Resp. at 7; 52 U.S.C. § 30101(9)(B)(ii). This exemption permits "[n]onprofit organizations described in 26 U.S.C. § 501(c)(3) or (c)(4) and which do not endorse, support, or oppose political candidates or political parties" to stage candidate debates in accordance with 11 C.F.R. §§ 110.13 and 114.4(f). 11 C.F.R. § 110.13(a)(1); Explanation and Justification, Funding and Sponsorship of Federal Candidate Debates, 44 Fed. Reg. 76,734 (Dec. 27, 1979) ("110.13 E&J"). The regulations leave the structure of the debate to the discretion of the staging organization, provided that the organization does not arrange the debates in a manner that promotes or advances one candidate over another and the criteria for candidate selection are objective and pre-established. 11 C.F.R. § 110.13(b), (c). Under section 114.4(f), the staging organization may use its own funds and may accept funds donated by corporations to defray costs incurred in staging candidate debates. Thus, if the debate staging organization meets the requirements of section 110.13(a)(1), and stages debates in accordance with sections 110.13(b) and (c) and section 114.4(f), the organization's activities are exempt from the definitions of "contribution" and "expenditure." See 110.13 E&J; Explanation and Justification, Corporate and Labor Organization Activity, 60 Fed. Reg. 64,260, 64,261 (Dec. 14, 1995); 11 C.F.R. § 100.154 ("Funds used to defray costs incurred in staging candidate debates in accordance with the provisions of 11 C.F.R. § 110.13 and 114.4(f) are not expenditures.").

The Complaint in this matter traces the CPD's history to suggest that the CPD is an instrument of the Democratic and Republican parties and alleges that the CPD's 15% polling

requirement is intended to limit participation to Democratic and Republican nominees. The Complaint asserts that Respondents failed to comply with the Commission's regulations governing debate sponsorship because the CPD: (1) is not non-partisan and therefore is not a qualified "staging organization," and (2) failed to apply pre-established, objective criteria because its criteria include a public opinion polling requirement that is intended to limit participation to Democratic and Republican nominees and discriminate against independent and third-party candidates. Compl. at 15-53 (Sept. 11, 2014). *See* 11 C.F.R. § 110.13(a)(1), (c). The Complaint alleges that because Respondents failed to comply with section 110.13, they made prohibited contributions and expenditures in violation of 52 U.S.C. § 30118, accepted prohibited contributions in violation of 52 U.S.C. § 30116(f), and failed to register and report as a political committee in violation of 52 U.S.C. §§ 30103 and 30104. *Id.* at 57-59.

Respondents deny the allegations. They contend that the CPD does not "endorse, support, or oppose political candidates or political parties," and that it "adopts nonpartisan candidate selection criteria well in advance of each general election debate season and it adopts and applies those criteria solely to advance the educational purposes of its debates and not to advance or oppose any candidate or political party." Resp. at 4.

Respondents further state that the CPD used the same candidate selection criteria for the 2012 presidential general election debates as it did during the 2000, 2004, and 2008 elections:² (1) evidence of the candidate's constitutional eligibility to serve as President; (2) evidence of ballot access, meaning that the candidate qualified to have his or her name appear on enough state ballots to have at least a mathematical chance of securing an electoral

² The CPD appears to have disclosed these criteria on or about October 20, 2011, for the 2012 debates. *See* Resp., Ex. 1, Tab E at 2 (reflecting adoption date of October 20, 2011).

majority in the 2012 general election; and (3) indicators of electoral support of at least 15% of the national electorate as determined by five selected national public opinion polling organizations, using the average of those organizations' most recently publicly reported results at the time of the determination. *See* Resp. at 6-7, Ex. 1, Tabs B-E.

Respondents assert that the CPD's criteria satisfy the requirements of section 110.13(c) and the Complaint's allegations should be rejected, a conclusion supported by Commission precedent. *See* Resp. at 6-12. Indeed, previous MUR complainants have made similar allegations against the CPD's status as a staging organization and its candidate selection criteria, and in all such previous matters, the Commission found no reason to believe the CPD had violated the Act. The complainants in MURs 4987, 5004, and 5021 alleged that the CPD and its board of directors were bipartisan, not nonpartisan, because the CPD was created by the former chairs of the DNC and RNC to allow the major parties to control the presidential and vice presidential debates and to promote their candidates, in violation of 11 C.F.R. § 110.13(a). The complainants in those MURs also maintained that the CPD's 2000 debate selection criteria – the same criteria used in 2012 – were subjective and violated 11 C.F.R. § 110.13(c), particularly its requirement that debate participants demonstrate popular support levels of at least 15 percent. The Commission found no reason to believe that the CPD and its Co-Chairs violated former 2 U.S.C. §§ 433, 434, 441a(f) and 441b(a) (now 52 U.S.C. §§ 30103, 30104, 30116(f), and 30118(a)) in those matters. *See* Certification, MURs 4987, 5004, and 5021 ¶¶ 1, 4, and 7 (July 20, 2000).

The complainants in MUR 4987 contested the dismissal of that MUR under former 2 U.S.C. § 437g(a)(8) (now 52 U.S.C. § 30109(a)(8)), but the court upheld the dismissal and the Commission's determination that the CPD was an eligible debate staging organization, as

well as its conclusion that the “15% support level set by the CPD” in its third criterion, was not inconsistent with the Commission’s regulations. *Buchanan v. FEC*, 112 F. Supp. 2d 58, 74 (D.D.C. 2000), *aff’d in part*, No. 00-5337 (D.C. Cir. Sept. 29, 2000). The *Buchanan* court specifically addressed the CPD’s use of pre-debate polling, holding that it was not unreasonable or subjective to consider the extent of a candidate’s electoral support prior to the debate to determine whether the candidate was viable enough to be included. *Id.* at 75; *see also Natural Law Party v. FEC*, Civ. Action No. 00-02138 (D.D.C. Sept. 21, 2000), *aff’d in part*, No. 00-5338 (D.C. Cir. Sept. 29, 2000) (brought by complainants in MUR 5004, the court found for the Commission based on the reasoning set forth in *Buchanan*).

Likewise, the complainant in MUR 5207 alleged that the CPD was partisan and that the major parties monopolized the debates by arranging to limit participation to their candidates, and the Commission found no reason to believe that the CPD and its Co-Chairs violated former 2 U.S.C. §§ 433, 434, 441a(f) and 441b(a). *See Certification*, MUR 5207 (Aug. 8, 2002). Further, the complainant in MUR 5414 generally contended that the CPD was a product of the two major parties, actively promoted their interests, and was so strongly biased against third-party candidates that it violated the “nonpartisan” and “debate selection criteria” prongs of the Commission’s debate regulations. Again, the Commission found no reason to believe that the CPD had violated or was violating former 2 U.S.C. § 441b(a). *See Certification*, MUR 5414 (Dec. 14, 2004). Finally, the complainant in MUR 5530 argued that the CPD’s 2004 debate selection criteria – the same criteria used in 2012 – particularly its requirement that debate participants demonstrate popular support levels of at least 15%, was “partisan” and a deliberate attempt to avoid including those candidates who theoretically could win the election based on their ballot access. The Commission found no reason to

believe that the CPD violated former 2 U.S.C. § 441b(a). *See* Certification, MUR 5530 (May 5, 2005).

Complainants in the present matter, in a supplement to the Complaint, argue that their allegations that the CPD supports the Republican and Democratic parties and opposes third parties and independents in violation of the candidate debate regulations are corroborated by statements the CPD's Co-Chair Fahrenkopf made in an interview with Sky News on April 1, 2015. Complainants assert that Fahrenkopf "admitted" that the CPD's system for selecting general election debate candidates "consists of 'go[ing] with the two leading candidates, it's [sic] been the two political party candidates.'" ³ Supp. at 1-2. Respondents, however, contend that this allegation lacks merit and that Complainants have distorted Fahrenkopf's words. According to Respondents, Fahrenkopf was simply reciting "the historical fact that, in the United States, the general election debates usually have been between two candidates, who have been the major party nominees." Supp. Resp. 2; *see also id.* Fahrenkopf Decl. ¶ 4. Fahrenkopf's full interview statement – "we . . . primarily go with the two leading candidates, it's been the two political party candidates, save in except for 1992 when Ross Perot

³ The relevant portion of the Sky News interview follows:

Interviewer: And, this time around, of course, together, the television companies wanting to do the two lead candidates, the three lead candidates, and then a four candidate debate, the conservative leader said he wouldn't do that, and we've ended up with a seven person, a seven party, debate. What do you think the prospects for that are?

Frank Fahrenkopf: Well, you know the primary debates here in the United States, we often — and of course the Republicans three years ago, had seven or eight people on the stage, and people jokingly say it's less of a debate than a cattle show, because there's such little time for each candidate to get across in the short period what their views are on issues. That's why in the general election debate, we have a system, and we, you know, as you know, primarily go with the two leading candidates, it's been the two political party candidates, save in except for 1992 when Ross Perot participated in the debates. So, seven people on the stage at one time is very difficult, it's going to take a very clever moderator to make sure that each candidate gets an opportunity to put forth their views.

Supp., Ex. A at 2 (transcript of interview).

participated in the debates” – suggests that he was describing historical fact, not that CPD used “nomination by a political party as the sole objective criterion to determine whether to include a candidate in a debate.” *See* 11 C.F.R. § 110.13(c).

In sum, Complainants make the same allegations regarding the same candidate selection criteria that the Commission has considered and found insufficient to support a reason to believe finding, and the supplement to the Complaint does not provide any additional information indicating that the CPD violated the Act.⁴ Based on the available information, the debates staged by the CPD satisfy the requirements of 11 C.F.R. § 110.13. Therefore, the CPD’s expenditures on these debates are not contributions or expenditures under the Act, and the CPD does not meet the definition of a political committee subject to the registration and reporting requirements of the Act. Accordingly, the Commission finds no reason to believe that the Commission on Presidential Debates or Frank Fahrenkopf, Jr. and Michael D. McCurry as Co-Chairs violated 52 U.S.C. §§ 30118(a) or 30116(f), and no reason to believe that the Commission on Presidential Debates violated 52 U.S.C. §§ 30103 or 30104.

⁴ Complainants argue that the Commission should not dismiss this matter based on prior decisions because the Complaint contains new evidence and arguments that the Commission has not previously addressed. Compl. at 53. Specifically, the Complaint claims that it presents “different and detailed evidence” that demonstrates (1) that the 15% polling criterion is not reasonably achievable for a third-party or independent candidate and (2) that polling criterion in a three-way race will systematically disfavor third-party and independent candidates. *Id.* Even if CPD’s 15% polling criterion may tend to exclude third-party and independent candidates, the available information does not indicate – as the available information in previous complaints did not indicate – that the CPD failed to use pre-established, objective criteria. *See* 11 C.F.R. § 110.13(c).